In the Supreme Court of the United States.

OCTOBER TERM, 1899.

THE UNITED STATES, APPELLANT,
v.
KLEINWORT SONS & Co., CLAIMANTS of the cargo of the Spanish bark "Carlos F. Roses." } No. 243.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AND THE CAPTORS.

It is understood that in purchases and shipments of goods upon bills of lading which are attached to bills of exchange drawn against them the bill of exchange is drawn upon the consignee and purchaser and is sent forward for collection by the bank in the territory of shipment, which cashes the draft through the ordinary domestic channels or by sale in the foreign exchange market. The seller of the goods (whether or not also the consignee's agent to purchase and the shipper) and the

bank which cashes the draft are thus recouped, though liable over to their indorsees upon default by the party ultimately chargeable, unless the transfer or sale is without recourse. It is also understood that in cotton shipments of this character to foreign points—as, for instance, interior English or German manufacturing towns—the ultimate owner of the goods, the merchant or manufacturer, is often the drawee. It is also no doubt true that a bank or bankers at the interior point or at the general exchange center, such as London, or Bremen, or Berlin, is frequently the drawee of the bill of exchange instead of the consignee and real owner. But this ordinarily means, as we understand it, that the real owner, the customer of the drawee bank, has an arrangement with the latter, upon some special contract or upon a general running account by the deposit of funds or the pledge of other security or upon personal liability, in consideration of which the banker consents to stand in the owner's place and pay the draft and discharge the obligation through the chain of indorsees. That is to say, the banker who thus places himself in the position of drawee has not only his recourse against the goods of the particular shipment, but also against his customer who has ordered the goods and owns them and who is bound to make good, under the agreement and dealings between them, any loss or deficiency that may result. And it is obviously the fact that usually there is no question of sale of the goods and payment thereout; but the draft, when it comes in and is paid, is charged on the bank's books to the customer's account. The banker has control of the goods, but they do not constitute his only hold on his merchant

customer. And the final holder is not merely an agent to collect and remit the advances, who holds the bills until the draft is taken up; but himself pays the draft (or by acceptance becomes liable to do so), and nevertheless forthwith delivers the documents, charging his customer's deposit account or running credit on a demand or time basis, as the case may be.

The payment of a debt owed by the resident of one part of the country in another part by the ordinary domestic bill of exchange or bank draft on the central exchange city, such as New York, not involving the feature of the bill of lading, does not appear to be analogous. The banker in the former case bears a peculiar relation, both to the real owner and to the shipper, in a course of dealing which has grown up by trade usage and for commercial convenience. The banker in the latter case is the drawee of an ordinary check against funds on deposit.

This being the general commercial situation in such transactions, and the position of the bankers who are claimants here, what rules as to their title should be applied to them in a prize court?

We do not deny that there is little or nothing to impeach the transaction on its face; that is to say, little or nothing to impeach the claim of *bona fide* purchase, for the invoice showing of enemy ownership does not necessarily show any circumstances of fraud or unfairness. The allegations of the claim need not be regarded as evasive or essentially inconsistent, it is true. The claimants say they are wholly unindemnified except by the insurance. While they do not say that they instructed

their Habana agents not to deliver the goods until payment, they no doubt mean to imply as much when they say that in the ordinary course these agents would have held the bills of lading until payment had been made or security given. But if bills of lading are not negotiable, in the full sense of bills of exchange, and if the real intent of the parties and the real nature of the transactions may be shown under certain circumstances, notwithstanding the prepossessions in favor of a purchaser for value, and especially may be shown as between the banker and the consignee and real owner, the actual facts may consequently be shown here consistently with the ordinary commercial rule; for the captors necessarily claim as succeeding to the real owner's rights, and while they so succeed under an adverse claim, undoubtedly they could have adduced evidence (provided they were able to find it) upon the nature of this transaction and the relations of the parties, if further proof had been allowed to them.

But the reply may be made to this that even if all the foregoing were true, further proof was not allowed to the captors and nothing has been shown to defeat the claimants' rights or to establish a different situation from that alleged by them except general suspicions inferred from the statements of the affidavits and the documents, particularly as to the ultimate enemy ownership. And as to the latter feature it is said that an invoice is not one of the significant documents, so far as the contract of shipment and the title by indorsement and delivery of the bills of lading are concerned.

If, however, this view is sustained, what then becomes

of the ordinary rule in prize? Is it necessary that the captors should show circumstances of fraud or unfairness appearing in the transaction? Is it not rather necessary that the claimant should show the absence of anything to impeach the transaction and the nonexistence of collusion or neutral cover to an enemy interest by disclosing fully all the facts and relations, with the correspondence concerning the order to purchase, to accept the drafts, to deliver the goods or withhold delivery? Should not these things be shown fully and positively, so that the antecedent, accompanying, and consequent facts or dealings may all be known? And if such proof is not made, does the neutral claimant meet the burden of proof? And has he not been astute to keep the court from being apprised of circumstances which, if produced, might have been disastrous to the cause of the producent? We read all the cases as establishing beyond doubt that a neutral claim of this nature must be established beyond meager statement, bare allegations, and a simple *ex parte* attestation. So strictly has this rule been enforced that Lord Stowell, in the case of the *Rosalie and Betty*, cited in the additional brief for the Government and captors, would not allow the claimants a second opportunity for further proof, although they were anxious to fortify and enlarge their evidence, their showing under the proof offered being sparse and merely formal.

We think the principles which we thus invoke are fully sustained by the cases which we cite, both on the general commercial doctrine as to transfer by indorsement of a bill of lading and on the rule in prize; but we

beg leave, in conclusion, to submit to the court a brief discussion on two of the cases cited which may be regarded as typical of the general rule and the prize rule.

In the case of *Conard* v. *Atlantic Ins. Co.* (1 Pet., 292) there was an advance by insurers to a merchant engaged in the China trade upon the security of bills of lading of an outward cargo shipped from this country to China and upon the security also of the return proceeds of the cargo in specie, which came back under bills of lading. The security of the bankers was held to be valid against a levy on behalf of the Government on a judgment for duties, and the court in the course of the opinion reviewed carefully and distinguished the previous case of *Thelluson* v. *Smith* (2 Wheat., 396), which was a case from Pennsylvania, and decided that the lien of a judgment on land was not prior to a subsequent levy in favor of the Government, because the lien had not been perfected by the issue of execution before the Government levy was made. An effort was made in the case of *Conard* v. *Atlantic Insurance Co.* as well as in the case of *Thelluson* v. *Smith* to establish the Government right of priority in any such case under the statutes which declare that in case of insolvency or of the indebtedness of a decedent's estate, where the assets are insufficient to pay all the debts due, the debt of the United States shall be first satisfied; and the decision was that the right of the United States under those statutes was not a right which supersedes and overrules the assignment of the debtor as to any property which the United States may afterwards elect to take in execution, but was a mere right of prior payment out of the general fund of the debtor in the hands of the assign-

ces. This feature of the Conard case is pointed out, because here, too, a sovereign right of the United States is involved, which, however, is not limited by statute, but is broad and complete; which does not need statutory authority and is more than a preference, because under prize decisions applicable to the facts here the sovereign right overrides and extinguishes the adverse lien.

But what was the ground upon which the court decided in the Conard case that the title of the transferee of the bills of lading was valid against the Government levy for taxes? The contention of the United States was that the debtor remained owner of the goods and their proceeds through the entire voyage; that at most the insurance company had but a lien for the security of their debt, which was displaced by the priority of the United States and must yield to their superior privilege. But the court said (in effect) that the debtor had full power, notwithstanding a consignment to his agent in China and the return consignment of the proceeds to order in blank, and indorsed in blank by the shipper (an attorney for said agent in China), to pass the title to the property in the bill of lading by a suitable instrument of assignment and sale, which was good against anybody but a purchaser without notice from his consignee; that the language of the indorsement was that of a complete and express assignment with sufficient words of grant and with recital of the facts, and that this complete title was not cut down to a mere lien or equity by the language of the accompanying memorandum, which stated that the bills of lading should be indorsed to the insurance company as collateral security for the outward cargo, and

that the bills of lading for the proceeds to be shipped homeward for account and risk of the borrowers should also be indorsed in blank and delivered to the insurance company as a continuation of the security.

From the foregoing case we argue that in an ordinary commercial transaction and civil suit the title of the bankers here would not necessarily be good against a subsequent lien in favor of the Government, because although the memorandum in the Conard Case showed that the shipments were at the risk of the debtor (as the invoice shows the risk here to be the enemy owner's), yet the transfer on the bill of lading was so complete, express, and absolute that title plainly passed. The form of transfer in the Conard Case was much more than the mere indorsement shown in the case at bar.

And now take the case of *The Merrimack* (8 Cr., 317) as typical of the prize rule. In that case goods were consigned to the British consignor's agent, an American citizen, but the bill of parcels or invoice was in the name of the American merchants for whom the purchase was made, and the shipment was said to be on their account, although private letters of the consignors refer to the property as British. The decision regards as unfavorable to the claimants evidence that the direct consignee, the agent of the British merchants, had such control over the goods that he could have refused to deliver them to the American purchasers, and also statements in the correspondence tending to acknowledge the property to be British; but found it a circumstance favorable to the claim that the original bill of parcels was made directly to the claimant and was sent along with the shipments as

a substitute for an invoice. And since the correspondence showed that the bills of lading were sent to the consignee, yet not to his own use, but to the use of the claimants, and because the bill of parcels or invoice was made out to the claimants, which gave them the right to demand the goods of the consignee, a decree of restitution was affirmed. It will be noticed that the invoice showing had great weight in this result.

Justice Story was unable to concur, on the ground that while the bill of lading purports that the goods are shipped on account and risk of the consignee, confidential letters explain the transaction and show that the shipment was so made as a cover against belligerent risks, and that the legal property and possession thereof still remained in the shippers; and if the consignee had come into possession of the goods his possession would have been but a continuation of the possession of the shipper.

> If they had been lost during the voyage, the loss would have been his. * * * At the time of the shipment and capture it was, in my view, enemy property liable to condemnation, having no American or neutral *onus* attached to it. * * * The right of capture acts upon the proprietary interest of the thing captured at the time of capture. It is not affected by the secret liens or private engagements of the parties. It repudiates even the strong claim of a bottomry bond, because it is not a *jus in re*. Can, then, a mere possibility be of more consideration in a court of prize? The absence of all authority to this effect and the strong and emphatic language of all the cases as to secret liens speak as powerfully as the most direct and pointed decisions against it.

It will be noticed also that there was no doubt that the British shippers were not mere agents to purchase; they were the manufacturers and owners of the goods, and that the claimants produced the private correspondence, although it told against them and was the basis of Justice Story's dissent.

As to another claim in the case for goods so purchased—that is, before the war—it was held that, although the accompanying invoices, bills of lading, and letters are addressed by the British consignors to the American citizens for whom the purchase was made, and all concur to show the property to be in them, yet if these documents are inclosed in a letter from the shippers and consignors to their agent in the United States, directing him not to deliver the goods in case of the existence of certain circumstances, nor until he had received payment of the consignees, the property continued in the British owners and was properly condemned. Restitution was granted on a third claim because the shipping documents and a letter showed in the clearest manner that the property was purchased and shipped for the American claimants, on their order and at their risk, and that the consignment to the agent of the British merchants (an American citizen) was accounted for.

Thus it is seen that in all these claims the real ownership appeared in various ways and was submitted to the court and was decisive of the question. The invoice was regarded as a very significant document, and whether the goods were restored or condemned, the decision rested not so much on what the shipping papers showed, ~~but~~ as

upon the real interest disclosed and upon the confidential correspondence and orders offered in proof.

Therefore we respectfully submit that if the claimants in the case at bar were *bona fide* purchasers for value, and were wholly unindemnified except by the insurance, which may have been placed, for all the claim shows, by enemy underwriters, this is at best a *prima facie* case, fairly open to suspicion, because the enemy ownership appears on the invoice and because the shipment was made *imminente bello;* and the claimants should have established the *bona fides* of their claim by offering, under the burden of proof cast upon them, the fullest information about the entire transaction—the correspondence and orders involved—and can not justly succeed upon their bare attestation that they are purchasers for value.

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SUGGESTION ON BEHALF OF THE UNITED STATES OF TWO ADDITIONAL AUTHORITIES.

The United States, with the consent of counsel for the claimants, and for the further information of the court, submits the following two additional authorities, discovered since the argument, on the proposition that capture as prize of war *jure belli* overrides all previous liens:

The *Hampton*, 5 Wall., 372;

The *Battle*, 6 Wall., 498.

In these two cases liens on the vessel alone were involved, but the language of the decisions is general, and in the decision in the *Hampton* case the doctrine is specifically extended and applied to cargoes.

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